Cheney Construction, Inc. *and* Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, Local 918. Case 17–CA–22517

February 4, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On September 9, 2004, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel and the Charging Party filed answering briefs to the Respondent's exceptions and the Respondent filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Cheney Construction, Inc., Manhattan, Kansas, its officers, agents, successors, and assigns shall take the action set forth in the Order.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 4, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Michael Werner, Esq., for the General Counsel.
Robert C. Johnson, Esq., for the Respondent.
Michael J. Stapp, Esq., for the Charging Party Union.

DECISION[1]

ALBERT A. METZ, Administrative Law Judge. This case involves issues of whether the Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act.[2] Specifically, the issues center upon allegations of unlawful surveillance, interrogation, and discrimination in hiring. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact.

I. JURISDICTION

The Respondent, a Kansas corporation, is engaged in the construction business and has offices in Manhattan, Kansas. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

Ronald Cheney is the Respondent's president and is responsible for the Respondent's general operations. He employs field superintendents who are in direct charge of the Respondent's construction crews on its various jobs. The field superinten-

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In concluding that the Respondent violated Sec. 8(a)(3) and (1) by failing and refusing to consider for hire and failing and refusing to hire applicants Randy Mumpower, David Johns, and Kenneth Fairchild, the judge found that the Respondent's usual practice in processing applications was to put them in the field superintendents' office boxes for consideration, and that the Respondent departed from that practice by merely filing the applications. The record evidence shows that, depending on the hiring needs of the Respondent, the Respondent's administrative assistant Shelley Vigoren would put the applications in the job superintendents' boxes if there were openings, and would file them if there were no openings. However, when asked by the judge why she did not put the applications in the superintendents' boxes on this occasion, Vigoren testified, "Probably because I knew they were with the Union and they weren't really looking for a job." We find that Vigoren's response shows that antiunion animus, not a lack of job openings, motivated her decision to file the applications and remove them from consideration in hiring, and we adopt the judge's finding that the failure to consider and hire the three alleged discriminatees violated Sec. 8(a)(3) and (1).

[2] Consistent with *Dean General Contractors*, 285 NLRB 573 (1987), the judge ordered reinstatement and backpay for the three disriminatees. Chairman Battista and Member Schaumber recognize that *Dean General* represents current Board law. They have concerns, however, as to whether that case was correctly decided. Accordingly, they will leave to compliance the issue of how long these employees, if they had not been discriminated against, would have remained employees of the Respondent. The resolution of this issue will determine the amount of backpay and whether reinstatement continues to be appropriate. See *Quantum Electric, Inc.*, 341 NLRB No. 146 (2004).

[1] This matter was heard at Manhattan, Kansas, on May 4, 2004. All dates in this decision refer to 2003 unless otherwise stated.

[2] 29 U.S.C. §158 (a)(1) and (3).

dents commonly do the hiring of the carpenters and helpers that make up the Respondent's construction crews.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Surveillance of Union Activities

In mid-2003 union business representative, Jeri Hynek, started contacting the Respondent's employees about joining the Union. On about August 14, Hynek sent the Respondent's employees a letter that included an invitation to meet with union representatives on August 19, at a Pizza Hut restaurant in Manhattan, Kansas. The letter was written on stationery that was headed with the Union's name and logo. The letter read in pertinent part:

> Dear Fellow Tradesman,
>
> You're invited to a Cheney Construction employee meeting at the Aggieville Pizza Hut, . . . Tuesday, August 19, at 5:30 pm . . . . Dinner will be provided and spouses are welcome.
>
> We will discuss the benefits of joining the Carpenters District Council of Kansas City and Vicinity. We will also discuss wages, health insurance, pension and working conditions. Please inform and encourage your co-workers on your jobsite to attend....
>
> Your participation is crucial and we look forward to talking with you then. Carpenters and Millwrights Local 918

On August 19, Hynek and union director of organizing, Todd Vie, arrived at the Pizza Hut at approximately 5:15 p.m. Hynek observed Ronald Cheney and Cheney's wife entering the Pizza Hut. Cheney called out to Hynek that he had come for the meeting and pizza. Hynek testified that he and Vie then entered the restaurant and talked with Cheney and his wife who seated in a booth near the restaurant's entrance. Cheney complained to Hynek about the purpose of the Union's letter and told him that the letter made it appear that Cheney was sponsoring the meeting. After their brief discussion with Cheney and his wife, Hynek and Vie went into a backroom to await the meeting. Cheney and his wife remained at the Pizza Hut until shortly after 6 p.m. and then left. Hynek testified that none of the Respondent's employees came to the union meeting.

Cheney testified that he saw a copy of the Union's invitation to the restaurant meeting. He interpreted the letter as meaning Cheney Construction was putting on a pizza party and this upset him. Cheney stated that he went to the restaurant, "To confront the Union guys for putting out a letter that sounded like it was representing the company." He noticed the union representatives arriving at the restaurant and said to them, "I came for my free pizza, meaning . . . if it is going to be a company party, I'm here." Cheney testified that when the union representatives came in the restaurant he voiced his displeasure with the letter. Cheney recalled that the union representatives invited him to join the meeting and he declined because he was upset.

The test of whether an employer's remarks or actions violated Section 8(a)(1)'s prohibition against interference, restraint, or coercion is not whether it succeeds or fails, but, rather, the objective standard of whether it tends to interfere with the free exercise of employee rights under the Act. *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 490 (1995). The evidence shows that no employees attended the August 19 meeting. No evidence was presented that any employee was deterred from attending because of Cheney's presence or that any employee ever learned, after the fact, that he was at the restaurant. The uncontroverted evidence demonstrates that the union representatives talked to Cheney, did not object to his presence or ask him to leave the restaurant and, in fact, invited him to attend the meeting. Under all the circumstances I find that the preponderance of the evidence does not support a finding that Cheney "engaged in surveillance of employees' activities on behalf of the Union" as alleged in the complaint. I conclude that the Respondent did not violate Section 8(a)(1) of the Act by Cheney's presence at the Pizza Hut restaurant on August 19.

B. Alleged Interrogation of Union Applicants

On August 27, union members Randy Mumpower, David Randy Johns, and Kenneth Fairchild went to Respondent's office to apply for employment. Mumpower, Johns, and Fairchild wore shirts, hats, and other union insignia identifying them as union members. Fairchild had a tape recorder in his shirt pocket and recorded what was said in the Respondent's office as the men applied for employment. Upon entering the office the men spoke to Shelley Vigoren, who is the Respondent's administrative assistant. They told her they wanted to apply for employment. After discussing the application forms with the men Vigoren asked them, "You guys all with the laborers union? Carpenters?" The men told her they were with the Carpenters' Union. The men then proceeded to fill out the applications, turn them into Vigoren and leave.

Vigoren is responsible for taking care of Respondent's personnel documents and assists in the hiring process by forwarding the applications to the field superintendents. The Respondent admitted that she is an agent of the Respondent within the definition of Section 2(13) of the Act.

The Government alleges that Vigoren's question to the men as to whether they were with the Carpenters or Laborers unions was an unlawful interrogation. The test to determine a violation of Section 8(a)(1) of the Act by interrogating an employee about his union sympathies is whether, under all the circumstances, the interrogation reasonably tends to restrain or interfere with employees in the exercise of their statutory rights. *Lippincott Industries*, 251 NLRB 262 (1980), enfd. 661 F.2d 112 (9th Cir. 1981). The Board has long held that questioning job applicants whose union membership or sympathies are unknown is inherently coercive and thus interferes with Section 7 rights. *Bendix-Westinghouse Automotive Air Brake Co.*, 161 NLRB 789 (1966); *McCain Foods*, 236 NLRB 447 (1978), enfd. sub nom. *NLRB v. Eastern Smelting Corp.*, 598 F.2d 666 (1st Cir. 1979). The Board has, however, found that an applicant was not coercively interrogated when he wore union insignia while applying for a job and was asked by the employer how long he had been in the Union. *Boydston Electric, Inc*., 331 NLRB 1450 fn. 5 (2000). (Thus, noting the open advocacy of the applicant and the nature of the question asked, we do not find this a coercive interrogation under Sec. 8(a)(1).) I find that Vigoren's question to the union applicants in this case is governed by *Boydston*. The men were prominently wearing cloth-

ing bearing union insignia. Thus, it was reasonably apparent that they were members or supporters of a labor organization and Vigoren's question was limited to an inquiry of which two unions they belonged. Under all the circumstances I conclude that such a question did not reasonably tend to restrain or coerce employees within the meaning of Section 8(a)(1) of the Act.

C. Refusal to Consider for Hire and Refusal to Hire

The Union men's August 27 applications demonstrated the following information was presented to the Respondent concerning their backgrounds. Fairchild's application was not retained by the Respondent but he testified that he stated in that application that he could start work immediately. He recalled that he likely listed his most recent work experience as having been with A. D. Jacobson (from February until July), Alberici Construction (from December 15, 2002 until February 15), and Industrial Maintenance (January 15, 2002 until May 15, 2002). Johns and Mumpower applied for a full-time carpentry positions and listed their most recent experience with various construction companies. The uncontroverted evidence detailed that all three union applicants had broad experience at the carpentry trade. I find, that Fairchild, Johns, and Mumford were experienced and qualified carpenters with wide exposure to various types of carpentry work.

Vigoren's usual practice in processing applications was to put them in the field superintendents' office boxes for consideration in hiring. The field superintendents did virtually all of the hiring for their respective projects. Vigoren testified that in the case of Fairchild, Johns, and Mumford, however, she did not follow her usual practice; rather she simply filed the applications away. When asked about her motivation for varying her practice as to their applications she testified:

> Vigoren: Probably because I knew they were with the Union and they weren't really looking for a job. (Tr. 148)

Vigoren later reported to Ron Cheney that Mumpower, Johns, and Fairchild had applied for work. On September 23, approximately a month after the men applied for work, Cheney sent them identical letters that stated in pertinent part:

> Thank you for your application for employment on August 27, 2003. We currently have no openings and are not hiring at this time. It is our policy to keep all employment applications on file for 14 days. If an opening has not occurred during the 14 days, we then discard the applications. Please feel free to reapply.

Mumpower and Johns did not reapply for employment with the Respondent. After August 27, Fairchild continued to submit applications for employment to the Respondent. None of the three union men were ever hired by the Respondent.

On August 29, Hynek sent union members Mark Gnadt and Curt Driscoll to apply for employment with the Respondent. Gnadt and Driscoll went to a project Respondent was working on at Briggs Automotive. Driscoll went onto the property and spoke to Respondent's superintendent, Todd Hudson, about applying for work as a carpenter. Hudson told Driscoll that the Briggs' project was almost finished but he could apply for work at the Respondent's office for carpentry work at other projects.

Gnadt and Driscoll then went to the Respondent's project at the Kansas State Bank. This time Gnadt went onto the jobsite where he spoke with Respondent's superintendent, Shane Murray. They discussed Murray's need for carpenters and Gnadt's carpentry experience and wage requirements. Gnadt told Murray that he was looking to be paid $16-per-hour. Murray had Gnadt fill out an application and told him that he would have to get approval in order to hire him. On August 30, Murray called Gnadt and said that he had received authorization to hire him. Gnadt commenced working for the Respondent on September 2, at the Kansas State Bank job.

Driscoll went to the Kansas State project the following day where he met with Murray who interviewed him for carpentry work. Driscoll filled out an application and Murray then sent him to the Respondent's office to submit the application and complete other paperwork. Driscoll was hired and commenced work at the Respondent's Kansas State Bank project on September 10, where he worked with Gnadt. The Respondent also hired another employee, Jason D. Clark, on September 10.

Driscoll and Gnadt did interior trim work which included framing and casing doors and windows, and installing cabinets. Approximately 3 weeks later the two union men were transferred to a project at the Garden Grove Apartments where they installed metal drywall grid on the ceilings and vinyl siding.

The Respondent terminated Driscoll on October 22, and Jason D. Clark was then assigned to work with Gnadt. Clark and Gnadt worked together for another few weeks finishing the installation of the vinyl siding on the apartment project. They traded off doing the cutting and installation work. After 3 weeks of this work Gnadt worked on interior trim, including installing window wrap, base trim, and door casings. Clark worked on installing towel bars, medicine cabinets, and door hardware.

Respondent's job superintendent Lawrence Murray testified that in August when Mumpower, Johns, and Fairchild applied for work he was supervising a project for the Respondent at a Bioprocessing facility. Murray stated that he did not have sufficient manpower on the job.

D. Analysis of the Hiring Issues

1. Refusal to consider

In *FES*, 331 NLRB 9 (2000), the Board set forth the standards for judging discriminatory refusals to consider individuals for hire and for assessing illegal refusals to hire. To establish a discriminatory refusal to consider case, it is necessary to show:

> (1) the respondent excluded applicants from a hiring process; and (2) antiunion animus contributed to the decision not to consider the applicants for employment.

I find that the evidence shows that the Respondent did exclude Fairchild, Mumpower and Johns from the hiring process. Vigoren admitted that she sidetracked their applications to a file. She did not submit them to the field superintendents, the Respondent's normal hiring procedure, because she thought they were unemployable due to their union membership. This

admission clearly demonstrates that antiunion animus was the motivating factor in excluding them from the normal hiring process. The diversion of the union men's applications from the usual hiring sequence assured that they would not be considered by the field superintendents for employment. I conclude, therefore, that on or about August 27, 2003, the Respondent did violate Section 8(a)(1) and (3) of the Act by unlawfully refusing to consider Fairchild, Mumpower, and Johns for hire because of their union membership.

2. Refusal tohire

The Board in *FES*, supra at 12, stated the following elements are necessary to establish a discriminatory refusal to hire:

> (1) The respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) The applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) antiunion animus contributed to the decision not to hire the applicants. Once these elements are established the burden will shift to respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation.

The Government's complaint alleges that on or about August 27, 2003, the Respondent refused to hire Mumpower, Johns, and Fairchild. The evidence shows, contrary to the Respondent's assertion, that it was hiring and had plans to hire on or about August 27. The Respondent hired Gnadt and Driscoll to do carpentry work within a few days after the union men applied. The Respondent's asserted policy is to retain applications for 14 days for consideration in hiring. (While it is questionable this policy existed at the time the union men applied on August 27, I do, nonetheless, take it into consideration in assessing the Respondent's defense to the refusal-to-hire allegation.) Within 14 days of the union men applying for work the Respondent additionally hired Jason Clark (hired 9/10/2003) and Jason Andrews (hired 9/08/03). Clark and Andrews are listed on the Respondent's records as being insured under the carpentry group policy. As discussed above, Clark worked with Gnadt and performed carpentry work. I find that the Government has proven that the Respondent had at least three carpentry job openings on or about August 27, 2003. Mumpower, Johns, and Fairchild were not considered for hire during that time because their applications were filed away and removed from the regular hiring process. I find that the evidence shows that the Respondent was indeed hiring or had plans to hire at the time the applicants sought work, that the applicants' experience and training qualified them for the positions for which they applied, and that antiunion animus contributed to the decision not to hire them.

The Respondent offered no explanation, other than the applicants' union membership, for the disparate handling of the union men's applications which had the effect of keeping the field superintendents from knowing they were seeking employment. Cheney testified, however, that the men would not have been hired regardless since their wage history showed that they earned more than the Respondent paid carpenters. I find this defense to be a fabrication as the record overwhelmingly demonstrates that the Respondent hired many workers at lower wages than they had earned at their prior employment. Additionally, job superintendent Lawrence Murray testified that he was not aware that the Respondent had any policy against hiring employees at a wage rate less than what they had been earning at their previous employer. I find the Respondent's "higher wage" defense to be a pretext. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966). I find that the Respondent has failed to satisfy its burden of showing that it would not have hired the union men even in the absence of their union affiliation. *Allied Mechanical Services*, 341 NLRB No. 141, slip op. at 3 (2004). I conclude, therefore, that the Respondent did unlawfully refuse to hire Mumpower, Johns, and Fairchild on or about August 27, 2003, in violation of Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Cheney Construction, Inc., Manhattan, Kansas, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity, Local 918 is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) and (3) of the Act.

4. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

5. The Respondent has not violated the Act except as herein specified.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[3]

ORDER

The Respondent, Cheney Construction, Inc., Manhattan, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to consider applicants for hire, or failing or refusing to hire applicants, because of their membership in, or support for, the United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity and its Local 918, or any other labor organization.

(b) Processing union supporters' employment applications differently from the applications of other individuals.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, offer Randy Mumpower, David Randy Johns, and Kenneth Fairchild immediate instatement to the positions for which they applied. If those positions no longer exist, offer them employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which they would have been entitled to had they not been discriminated against.

(b) Make Randy Mumpower, David Randy Johns, and Kenneth Fairchild whole, with interest, for any economic loss suffered as a result of the failure and refusal to hire them, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because Respondent is engaged in the construction industry, I shall further recommend, in accord with *Dean General Contractors*, 285 NLRB 573 (1987), that the Board leave to the compliance stage of this proceeding the determination of whether the discriminatees would have continued in the Respondent's employment after completion of the projects for which they would have been hired. *Network Dynamics Cables*, 341 NLRB No. 107, slip op. 1 fn. 2 (2004).

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to consider Randy Mumpower, David Randy Johns, and Kenneth Fairchild for hire or the unlawful refusal to hire them, and within 3 days thereafter notify the employees in writing that this has been done and that the unlawful refusal to consider them for hire and the unlawful refusal to hire them will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Manhattan, Kansas, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 27, 2003. *Excel Container, Inc.*, 325 NLRB 17 (1997).

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, September 9, 2004

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail or refuse to consider applicants for hire, or fail or refuse to hire applicants, because of their membership in, or support for, the United Brotherhood of Carpenters and Joiners of America, District Council of Kansas City and Vicinity and its Local 918, or any other labor organization.

WE WILL NOT process union supporters' employment applications differently from the applications of other individuals.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make Randy Mumpower, David Randy Johns, and Kenneth Fairchild whole, with interest, for any economic loss suffered as a result of our failure and refusal to hire them.

WE WILL offer Randy Mumpower, David Randy Johns, and Kenneth Fairchild employment in positions for which they applied. If those positions no longer exist, WE WILL offer them employment in substantially equivalent positions, without prejudice to seniority or any other rights or privileges to which they would have been entitled if we had not discriminated against them.

CHENEY CONSTRUCTION, INC.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."